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Mann Bracken, LLC**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

EVELINE HENRIETTE  
ROSENBERRY, } CASE NO.: C07-05448-JW  
Plaintiff, }  
vs. } ANSWER TO COMPLAINT  
MANN BRACKEN, LLC, a Georgia  
limited liability company, }  
Defendant. }

1           Defendant MANN BRACKEN, LLC (“Defendant”) hereby submits the  
2 following Answer to the First Amended Complaint (“Complaint”) filed in this  
3 action by plaintiff EVELINE HENRIETTE ROSENBERRY (“Plaintiff”):

4           1.       In answering Paragraph 1 of the Complaint, Defendant avers that the  
5 contents of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* and  
6 the Rosenthal Fair Debt Collection Practices Act, California Civil Code § 1788 *et*  
*seq.* are self-explanatory. Except as herein admitted, the remaining allegations of  
7 Paragraph 1 are denied.

9           2.       In answering Paragraph 2 of the Complaint, Defendant avers that the  
10 contents of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 are self-  
11 explanatory. Except as herein admitted, the remaining allegations of Paragraph 2  
12 are denied.

13           3.       In answering Paragraph 3 of the Complaint, Defendant admits that  
14 Plaintiff alleges that jurisdiction of this Court arises under 15 U.S.C § 1692k(d)  
15 and 28 U.S.C. § 1337; that supplemental jurisdiction exists for Plaintiff’s state law  
16 claims pursuant to 28 U.S.C. § 1367; and that declaratory relief is available  
17 pursuant to 28 U.S.C. §§ 2201 and 2202. Except as herein admitted, the  
18 remaining allegations of Paragraph 3 are denied.

19           4.       Denied.

20           5.       In answering Paragraph 5 of the Complaint, Defendant admits that  
21 Plaintiff alleges that venue in this district is proper pursuant to 28 U.S.C. §  
22 1391(b) and 15 U.S.C. § 1692k(d). Defendant admits that it has, at times,  
23 conducted interstate business with residents of this judicial district. Except as  
24 herein admitted, the remaining allegations of Paragraph 5 are denied.

25           6.       In answering Paragraph 6 of the Complaint, Defendant admits that  
26 Plaintiff alleges that this lawsuit should be assigned to the San Jose Division of  
27  
28

1 this Court. Except as herein admitted, the remaining allegations of Paragraph 5 are  
2 denied.

3       7. Defendant admits, on information and belief, that Plaintiff is a natural  
4 person residing in Santa Clara County, California. Defendant lacks sufficient  
5 knowledge to form a belief as to whether Plaintiff's financial obligation at issue  
6 was incurred primarily for personal, family or household purposes, and therefore  
7 can neither admit nor deny whether Plaintiff qualifies as a "consumer" as defined  
8 by 15 U.S.C. § 1692a(3) or as a "debtor" as defined by California Civil Code §  
9 1788.2(h). On that basis, Defendant denies the allegations. Defendant also lacks  
10 sufficient knowledge to form a belief as to whether Plaintiff is a "senior citizen" as  
11 defined by Cal. Civ. Code § 1761(f) and on that basis, denies the allegation.  
12 Except as herein admitted, the remaining allegations of Paragraph 7 are denied.

13       8. In answering Paragraph 8 of the Complaint, Defendant admits that it  
14 is a Georgia limited liability partnership with its principal place of business located  
15 at 2727 Paces Ferry Road, Suite 1400. Atlanta, Georgia 30339-4053. Defendant  
16 further admits that it has, at times, acted as a debt collector as defined by 15 U.S.C.  
17 § 1692a(6); that it uses the mail and telephone to conduct its business; and that it  
18 has, at times, attempted to collect debts that are due to others. Except as herein  
19 admitted, the remaining allegations of Paragraph 8 are denied.

20       9. In answering Paragraph 9 of the Complaint, Defendant admits, on  
21 information and belief, that Plaintiff incurred a financial obligation through the use  
22 of a credit card account which was issued by Chase Bank USA, N.A. Defendant  
23 lack sufficient knowledge to form a belief as to the remaining allegations of  
24 Paragraph 9 of the Complaint and on that basis, denies them.

25       10. Admitted.

26       11. In answering Paragraph 11 of the Complaint, Defendant admits that it  
27 sent Plaintiff a letter dated November 6, 2006 the contents of which are self-  
28

1 explanatory. Defendant lacks sufficient knowledge to form a belief as to whether  
2 Plaintiff's financial obligation at issue was incurred primarily for personal, family  
3 or household purposes, and therefore can neither admit nor deny whether the letter  
4 qualifies as a "communication" as defined by 15 U.S.C. § 1692a(2) and on that  
5 basis, denies the allegation. Except as herein admitted, the remaining allegations  
6 of Paragraph 11 are denied.

7 12. In answering Paragraph 12 of the Complaint, Defendant admits that it  
8 sent Plaintiff a letter dated November 6, 2006 the contents of which are self-  
9 explanatory. Except as herein admitted, the remaining allegations of Paragraph 12  
10 are denied.

11 13. In answering Paragraph 13 of the Complaint, Defendant admits that it  
12 sent Plaintiff a letter dated November 6, 2006 the contents of which are self-  
13 explanatory. Except as herein admitted, the remaining allegations of Paragraph 13  
14 are denied.

15 14. In answering Paragraph 12 of the Complaint, Defendant admits that it  
16 sent Plaintiff a letter dated November 6, 2006 the contents of which are self-  
17 explanatory. Defendant lacks sufficient knowledge to form a belief as to whether  
18 the postage meter stamp on the envelope containing that letter was dated November  
19 7, 2006, and on that basis denies the allegation. Except as herein admitted, the  
20 remaining allegations of Paragraph 14 are denied.

21 15. In answering Paragraph 15 of the Complaint, Defendant admits that  
22 its letter to Plaintiff dated November 6, 2006 was deposited in the United States  
23 Mail. Except as herein admitted the remaining allegations of Paragraph 15 are  
24 denied.

25 16. In answering Paragraph 16 of the Complaint, Defendant admits that it  
26 made telephone calls to Plaintiff. Defendant lacks sufficient knowledge to form a  
27 belief as to whether Plaintiff's financial obligation at issue was incurred primarily

1 for personal, family or household purposes, and therefore can neither admit nor  
2 deny whether the telephone calls qualify as a “communications” as defined by 15  
3 U.S.C. § 1692a(2) and on that basis, deny the allegation. Except as herein  
4 admitted, the remaining allegations of Paragraph 16 are denied.

5       17. Denied.

6       18. In answering Paragraph 18 of the Complaint, Defendant admits that  
7 its representative made a telephone call to Plaintiff on or about November 6, 2006  
8 and left a voicemail message, the contents of which are self-explanatory. Except as  
9 herein admitted, the remaining allegations of Paragraph 16 are denied.

10      19. In answering Paragraph 19 of the Complaint, Defendant admits that  
11 its representative made a telephone call to Plaintiff on or about November 7, 2006  
12 and left a voicemail message, the contents of which are self-explanatory. Except as  
13 herein admitted, the remaining allegations of Paragraph 19 are denied.

14      20. In answering Paragraph 20 of the Complaint, Defendant admits that  
15 its representative made a telephone call to Plaintiff on or about November 9, 2006  
16 and left a voicemail message, the contents of which are self-explanatory. Except as  
17 herein admitted, the remaining allegations of Paragraph 20 are denied.

18      21. In answering Paragraph 21 of the Complaint, Defendant lacks  
19 sufficient knowledge to form a belief as to the allegations of Paragraph 21 of the  
20 Complaint and on that basis, denies them.

21      22. In answering Paragraph 22 of the Complaint, Defendant admits that  
22 its representative made a telephone call to Plaintiff on or about November 14, 2006  
23 and left a voicemail message, the contents of which are self-explanatory. Except as  
24 herein admitted, the remaining allegations of Paragraph 22 are denied.

25      23. In answering Paragraph 23 of the Complaint, Defendant admits that  
26 its representative made a telephone call to Plaintiff on or about November 20, 2006  
27  
28

1 and left a voicemail message, the contents of which are self-explanatory. Except as  
2 herein admitted, the remaining allegations of Paragraph 23 are denied.

3       24. In answering Paragraph 24 of the Complaint, Defendant admits that  
4 its representative made a telephone call to Plaintiff on or about November 21, 2006  
5 and left a voicemail message, the contents of which are self-explanatory. Except as  
6 herein admitted, the remaining allegations of Paragraph 24 are denied.

7       25. In answering Paragraph 25 of the Complaint, Defendant admits that  
8 its representative made a telephone call to Plaintiff on or about November 22, 2006  
9 and left a voicemail message, the contents of which are self-explanatory. Except as  
10 herein admitted, the remaining allegations of Paragraph 25 are denied.

11       26. Denied.

12       27. Denied.

13       28. Denied.

14       29. Denied.

15       30. Denied.

16       31. In answering Paragraph 31 of the Complaint, Defendant admits that  
17 Plaintiff purports to bring her first claim for relief pursuant to the Fair Debt  
18 Collection Practices Act, 15 U.S.C. § 1692 *et seq.* Except as herein admitted, the  
19 remaining allegations of Paragraph 31 are denied.

20       32. Defendant incorporates by reference its responses to Paragraphs 1  
21 through 30 above, as if fully stated herein.

22       33. In answering Paragraph 33 of the Complaint, Defendant lacks  
23 sufficient knowledge to form a belief as to whether Plaintiff's financial obligation  
24 at issue was incurred primarily for personal, family or household purposes, and  
25 therefore can neither admit nor deny whether Plaintiff qualifies as a "consumer" as  
26 defined by 15 U.S.C. § 1692a(3) and on that basis, denies the allegation. Except  
27 as herein admitted, the remaining allegations of Paragraph 33 are denied.

1       34. In answering Paragraph 34 of the Complaint, Defendant admits that it  
2 has, at times, acted as a debt collector as defined by 15 U.S.C. § 1692a(6). Except  
3 as herein admitted, the remaining allegations of Paragraph 34 are denied.

4       35. In answering Paragraph 35 of the Complaint, Defendant lacks  
5 sufficient knowledge to form a belief as to whether Plaintiff's financial obligation  
6 at issue was incurred primarily for personal, family or household purposes, and  
7 therefore can neither admit nor deny whether it qualifies as a "debt" as defined by  
8 15 U.S.C. § 1692a(5) and on that basis, denies the allegation. Except as herein  
9 admitted, the remaining allegations of Paragraph 35 are denied.

10      36. Denied.

11      37. Denied.

12      38. Denied.

13       39. In answering Paragraph 39 of the Complaint, Defendant admits that  
14 Plaintiff purports to bring her second claim for relief pursuant to the Rosenthal Fair  
15 Debt Collection Practices Act, Cal. Civ. Code § 1788 *et seq.* Except as herein  
16 admitted, the remaining allegations of Paragraph 39 are denied.

17       40. Defendant incorporates by reference its responses to Paragraphs 1  
18 through 38 above, as if fully stated herein.

19       41. In answering Paragraph 41 of the Complaint, Defendant lacks  
20 sufficient knowledge to form a belief as to whether Plaintiff's financial obligation  
21 at issue was incurred primarily for personal, family or household purposes, and  
22 therefore can neither admit nor deny whether Plaintiff qualifies as a "debtor" as  
23 defined by Cal. Civ. Code § 1788.2(h) and on that basis, denies the allegation.  
24 Except as herein admitted, the remaining allegations of Paragraph 41 are denied.

25      42. Denied.

26       43. In answering Paragraph 43 of the Complaint, Defendant lacks  
27 sufficient knowledge to form a belief as to whether Plaintiff's financial obligation

1 at issue was incurred primarily for personal, family or household purposes, and  
2 therefore can neither admit nor deny whether it qualifies as a “consumer debt” as  
3 defined by Cal. Civ. Code § 1788.2(f) and on that basis, denies the allegation.

4 Except as herein admitted, the remaining allegations of Paragraph 43 are denied.

5 || 44. Denied.

6 || 45. Denied.

7 || 46. Denied.

8 || 47. Denied.

9 || 48. Denied.

0 || 49. Denied.

## AFFIRMATIVE DEFENSES

13 As and for separate affirmative defenses to the Complaint, Defendant  
14 alleges as follows:

## FIRST AFFIRMATIVE DEFENSE

## **(Failure to State a Claim)**

18 The allegations of the Complaint fail to state a claim against Defendant upon  
19 which relief can be granted.

## **SECOND AFFIRMATIVE DEFENSE**

#### **(Statute of Limitations/Laches)**

23 The purported claims set forth in the Complaint are barred in whole or in  
24 part by the applicable statutes of limitation and/or the equitable doctrine of laches.

# **THIRD AFFIRMATIVE DEFENSE**

## **(Bona Fide Error)**

To the extent that any violation of law occurred, which Defendant expressly denies, said violation was not intentional and resulted from a bona fide error notwithstanding the maintenance by Defendant of procedures reasonably adapted to avoid any such error.

## **FOURTH AFFIRMATIVE DEFENSE**

### **(Unclean Hands)**

The allegations in the Complaint and relief requested are on information and belief barred in whole or in part by the doctrine of unclean hands.

## **FIFTH AFFIRMATIVE DEFENSE (No Wilful Conduct)**

Defendant acted in good faith at all times in its dealings with Plaintiff, and if any conduct by Defendant is found to be unlawful, which Defendant expressly denies, such conduct was not willful and should not give rise to liability.

# **SIXTH AFFIRMATIVE DEFENSE**

## **(Failure to Mitigate)**

Plaintiff, although under a legal obligation to do so, has failed to take reasonable steps to mitigate any alleged damages that she may have and is therefore barred from recovering damages, if any, from Defendant.

1                   **SEVENTH AFFIRMATIVE DEFENSE**  
2                   **(Waiver)**

3                 Plaintiff has waived her rights, if any, to recover the relief she seeks in the  
4                 Complaint based upon her own conduct and admissions with respect to the debt.  
5

6                   **EIGHTH AFFIRMATIVE DEFENSE**  
7                   **(Good Faith)**

8                 Defendant has, at all material times with respect to Plaintiff, acted in good  
9                 faith in an effort to comply fully with all relevant federal and state laws.  
10

11                  **NINTH AFFIRMATIVE DEFENSE**  
12                  **(Apportionment)**

13                 Without admitting that any damages exist, if damages were suffered by  
14                 Plaintiff as alleged in the Complaint, those damages were proximately caused by  
15                 and contributed by persons other than Defendant. The liability, if any exists, of all  
16                 Defendants and/or any responsible parties, named or unnamed, should be  
17                 apportioned according to their relative degrees of fault, and the liability of this  
18                 Defendant should be reduced accordingly.  
19

20                  **TENTH AFFIRMATIVE DEFENSE**  
21                  **(Supervening Cause)**

22                 The causes of action in the Complaint are barred, in whole or in part, to the  
23                 extent that any injury or loss sustained was caused by intervening or supervening  
24                 events over which Defendant had or has no control.  
25  
26  
27  
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1                           **ELEVENTH AFFIRMATIVE DEFENSE**  
2                           **(Equitable Indemnity)**

3                           To the extent that Plaintiff has suffered any damage as a result of any alleged  
4                           act or omission of Defendant, which Defendant denies, Defendant is entitled to  
5                           equitable indemnity according to comparative fault from other persons and/or  
6                           entities causing or contributing to such damages, if any.

7  
8                           **TWELFTH AFFIRMATIVE DEFENSE**  
9                           **(Setoff)**

10                          To the extent that Plaintiff has suffered any damage as a result of any alleged  
11                          act or omission of Defendant, which Defendant denies, Defendant is, on  
12                          information and belief, entitled to a setoff in the amount Plaintiff owes on her  
13                          unpaid account, including any recoverable interest and attorneys' fees.

14  
15                          **THIRTEENTH AFFIRMATIVE DEFENSE**  
16                          **(First Amendment)**

17                          Defendant's alleged conduct and communications in attempting to collect a  
18                          debt is entitled to protection under the First Amendment of the Constitution of the  
19                          United States. Plaintiff's proposed interpretation of the provisions of the FDCPA  
20                          and the Rosenthal Act must be rejected as they would place an unreasonable  
21                          restraint upon the exercise of Defendant's rights, thereby raising serious  
22                          constitutional issues.

23  
24                          WHEREFORE, Defendant request judgment as follows:

- 25                          1. That Plaintiff take nothing by the Complaint, which should be dismissed  
26                          with prejudice.  
27                          2. That Defendant recover from Plaintiff costs according to proof.

- 1       3. That Defendant recover attorneys' fees according to proof.
- 2       4. That the Court orders such other further reasonable relief as the Court
- 3       may deem just and proper.

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5       DATED: November 23, 2007

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10      SIMMONDS & NARITA LLP

11      TOMIO B. NARITA

12      JEFFREY A. TOPOR

13

14      By: s/Tomio B. Narita

15

16      Tomio B. Narita

17      Attorneys for Defendant

18      Mann Bracken, LLC